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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1307

DAVIS OIL COMPANY, *et al.*,

Petitioners,

vs.

A. B. PARVIN,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent, A. B. Parvin, submits the following brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Davis Oil Company, Jack Davis, Marvin Davis, and Paul Messigner.

Opinions Below and Jurisdiction.

Respondent is satisfied with the "Opinions Below and Jurisdiction" portions of the Petition.

Questions Presented.

The "Questions Presented" portion of the petition is unacceptable to Respondent and Respondent urges the following questions.

I. Whether Petitioners, by their actions in offering and selling securities to Respondent, subjected their activities to the California Corporate Securities Law.

II. Whether the District Court's Findings of Fact, affirmed by the Court of Appeals, that the securities offered and sold to Respondent were not bona fide joint venture interests, were clearly erroneous.

Statement of Case.

Petitioners' Statement of Facts, is unacceptable to Respondent and Respondent urges the following statement of facts:

Statement of Facts.

Davis Oil Company (''DOC'') is a partnership composed of Jack Davis, Marvin Davis, and Jean Davis engaged in oil exploration with its principal place of business in Denver, Colorado. Each of the Davises is a resident of Colorado (CR 659, 680; RT 161).*

Respondent is a retired individual who resides in Beverly Hills, California (CR 680; RT 23).

During 1968, DOC offered and sold to Respondent investments in 3 separate oil and gas programs. In the style of the Pre-Trial Conference Order, the three separate DOC oil and gas drilling programs in which Respondent invested are referred to herein as ''Savoie'' (CR 659-660, 681-682); ''Offset'' (CR 660-669, 682-689); and ''Wildcat'' (CR 669-674, 690-695).

On February 20, 1968, from Denver, Jack Davis telephoned Respondent in Los Angeles and offered him an interest in Savoie for $15,000 (RT 32, 181). Respondent

*Petitioners' abbreviations as set forth in footnote 1 to the Petition are acceptable to Respondent.

accepted the offer by mailing his check to Mr. Davis the same day. Marvin Davis acknowledged receipt of Respondent's check on February 27, 1968 (PX 6 and 7).

During February and March, 1968, DOC sold fractional interests in the Savoie leases to Respondent and four other persons. Identical written agreements were executed between DOC and the three investors other than Respondent, but no written agreement was made with Respondent. DOC drilled an unsuccessful well on the leases and none of the participants received any income from their interest therein. The underlying oil and gas leases have, by their terms, expired (CR 659-660, 681-682).

Following the failure of Savoie, Jack Davis mailed Respondent a written offer to participate in ''minimum risk offset wells'' (PX 25), and on July 3, 1968, Jack Davis mailed Respondent duplicate originals of an agreement already signed on DOC's behalf. Respondent signed one of the duplicate originals and mailed it back to Jack Davis (CR 663-665, 684-685).

Between June 25, 1968 and September 4, 1968, DOC sold fractional interests in the Offset leases to Respondent and thirteen other persons. With the exception of the names of the parties, the percentages of their interests, the amount of their payments, and the names of the well prospects included, the terms of the agreements between DOC and each investor were the same. Respondent paid DOC a total of $92,651.78 for which he received a return of $2,008.67, thus making his total out-of-pocket investment $90,643.11. Three of the wells were plugged and abandoned by DOC and the underlying leases therefor have expired. DOC sold its interest in the fourth well to the Clinton Oil Company for $144,843.75 on October 3, 1969 (CR 660-669, 682-689).

On July 24, 1968, Jack Davis mailed Respondent duplicate originals of new agreements, already signed on behalf of DOC, (1) governing Respondent's investment in the Wildcat leases and (2) increasing Respondent's investment in the Offset leases (PX 29, 30, and 36). Respondent signed one duplicate original of each agreement and mailed them back to Jack Davis with his checks for $95,000 and $14,000 (CR 665-666, 671-672, 685-686, 692-693).

Between June 25, 1968 and October 22, 1968, DOC sold fractional interests in the Wildcat leases to Respondent and twelve other persons. With the exception of the names of the parties, the percentages of their interests, the amounts of their payments, and the names of the well prospects included, the terms of the agreements between DOC and each investor were the same. Respondent paid DOC a total of $103,740.80, for which he received a return of $4,-422.71, thus making his total out-of-pocket investment $99,318.09. Three of the wells were plugged and abandoned and the underlying leases therefor have expired. The fourth well produced for a period of time but no participant therein recovered his cost (CR 669-674, 690-695).

The investors in the Savoie, Offset, and Wildcat leases were composed of a number of separate groups. Each such group had been put together by a friend or business associate of the Davises and was composed of that person and a number of his friends and business associates. Generally, the members of each separate group were wholly unacquainted with the members of the other groups. In fact, the Davises had never met many of the members of these investing groups. There was no interaction between the separate groups or their members, and members of other groups, or, for that matter, with the Davises, either before, after, or during the conduct of these three drilling programs (RT 56-61, 183-184, 192-199, 200-201).

DOC was the "operator" of each of the three exploratory drilling programs on a turnkey basis. This meant that DOC either acquired or obtained the right to acquire oil and gas leases on the designated properties. It then sold to the non-operator investors for specific sums, predetermined by DOC, percentage or fractional interests (or the right to receive assignments of fractional interests) in the underlying leases, accompanied by DOC's obligation to drill an exploratory well on each of the leases down to the casing point (the "casing point" is that depth at which it is geologically apparent that the well will produce oil or gas in which "casing" is set or that the well will not produce in which case it is abandoned). DOC was obligated by these arrangements to drill an exploratory well to the casing point regardless of DOC's actual cost in so doing. Thus, the actual monetary contribution of DOC to these drilling programs when compared to DOC's percentage interest therein was not proportionate to the monetary contributions of the non-operator investors as compared to their percentage interests (CR 665-669, 672-674, 686-689, 693-695). If casing is set, thereafter the owners of interests in the leases (DOC and the investors) share profits and expenses (including the operator's expenses and overhead in operating the wells) in direct proportion to their interests. Because of the nature of DOC's risk taking, the investors did not have any control over or any participation in the conduct of the exploratory oil and gas operations on any of the leases in which they invested (RT 35, 38, 47-56, 76-77, 127-137, 171-173, 189-192, 199-200, 213; Jack Davis deposition, pages 10-17, 26-27; Heymann deposition, pages 27-28; PX 3, 4, 5, 14-26, 35 and 36; CR 448-451, 675, 677).

DOC neither obtained nor attempted to obtain a permit from the California Commissioner of Corporations under the California Corporate Securities Law for the offer or sale

to Respondent of interests in the three programs (CR 695-696, 674).

Certain parts of Petitioner's statement of facts are misleading. For instance, there was no evidence that Respondent had prior experience with securities laws—only Petitioners' speculation.

Also, when Petitioners caused these drilling programs to be treated as "organizations availed of for the joint production, extraction or use of property" under §761(a) of the Internal Revenue Code (Petition, p. 8), they specifically elected not to seek tax treatment as a joint venture or partnership with Respondent (CR 306-311).

REASONS FOR DENYING THE WRIT.

A. The Subject of the Instant Petition Concerns Only the Application of State Blue Sky Laws to the Facts of a Particular Oil and Gas Drilling Venture Syndication.

Given the nature of this case, it is unnecessary to review at length the criteria governing the issuance of a writ of certiorari by this Court, which has stated that it "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Petitioners have failed to show, pursuant to Rule 19 of the rules of this Court, any compelling reason for the granting of the writ in this case. No conflict among the circuits, no important constitutional question, no novel issue requiring this Court's attention, has been shown. The petition represents simply an effort to overturn a judgment, reviewed twice by the Court of Appeals, which resulted from the Petitioners' disregard of California Corporate Securities Law.

Petitioners assert two reasons for review by this Court, one concerning the application of California Blue Sky Laws to a sale of securities by Colorado citizens to a California citizen and the other concerning whether the facts of this particular transaction qualified the transaction for an exemption from the State Blue Sky Law afforded to "bona fide joint venture interests not offered to the public."

For the reasons explained below, neither of these subjects raises any significant issue on the record in this case. In holding that California Blue Sky Law applied and was violated, the Court of Appeals followed well established Cal-

ifornia precedent. Neither of these questions presents any federal question nor was either decided in conflict with any state law.

B. Application of the California Corporate Securities Act to Petitioners' Solicitation of Sales and Sales of These Drilling Program Interests to Respondent Was Factually and Legally Correct.

The picture painted by Petitioners in the petition has nothing whatsoever to do with the facts of this case.

Petitioners would have this Court believe that Respondent was a person with little or no contact with California who with full knowledge of California Blue Sky Law provisions, simply stepped across the border into California in order to mail a check to Petitioners so that he could by that act, and that act alone, invoke California law and thereby secure for himself a risk free investment. Suffice it to say that nothing of that sort is supported by the record.

In reality, Respondent's mailing of his $15,000 check to Petitioners was only a small part of a series of transactions by which Respondent invested over $200,000 in Petitioners' drilling programs, transactions which had substantial contacts with both California and Colorado.

Respondent was a citizen and resident of California of many years. There were telephone conversations and mail correspondence between Respondent in California and Petitioners in Colorado (RT 33-34, 45-47, 115, 180-183, CR 456-457, 574-575, PX 6, 7, 30, and 57) and there were meetings between the parties in California (RT 35, 184-188).

Two of these drilling programs were documented by 39 page agreements which were entered into in California.

It is clear that California was significantly involved in the dealings between these parties.

Solicitation of sales and sales of securities to California residents by foreign issuers are not, as Petitioners would have this Court hold, insulated from the application of California Blue Sky Law simply because some other state is also involved.

See, *e.g.*, *Western Air Lines, Inc. v. Sobieski,* 191 Cal. App. 2d 399, 406, 12 Cal. Rptr. 719 (1961):

> "Many cases hold that where the Corporate Securities Act is violated by solicitation of sales of stock in California, the Corporate Securities Act applies even though issuance of the stock and the transfer of title are to take place in a foreign state."

With respect to the $15,000 Savoie program, no contractual relationship was created until Respondent accepted Petitioners' offer to participate by mailing his check (PX 6).

See *California Civil Code* § 1583:

> "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section."

Also, because of the statute of frauds, there was no binding agreement until Respondent accepted the offer in writing (PX 6). (California Civil Code § 1624(4); *Denio v. Brennecke,* 6 Cal. App. 2d 678, 45 P.2d 229 (1935).)

The written contracts for the Offset and Wildcat programs were made in California where (having previously been signed by Petitioners) they were signed by Respondent. To contend that a 39 page document setting forth in meticulous detail the rights and obligations of the parties thereto could be "made" before it was signed by both parties is contrary to both law and reason. See, for example, *Pacific Inter-*

mountain Express Co. v. Alexander, 205 Cal. App. 2d 640, 23 Cal. Rptr. 227 (1962).

Where parties intend that before a contract shall exist between them, a writing shall be subscribed to by both parties, a complete or binding contract does not arise until the writing has been signed. See, *e.g.*, *Frankenheimer v. Frankenheimer*, 231 Cal. App. 2d 101, 108-09, 41 Cal. Rptr. 636 (1964); *Store Properties, Inc. v. Neal*, 72 Cal. App. 2d 112, 116, 164 P.2d 38 (1945).

Petitioners quote from a portion of *B. C. Turf and Country Club, Ltd. v. Daugherty*, 94 Cal. App. 2d 320, 210 P.2d 760 (1949). The following quotation from that case should also be considered:

> "From a standpoint of interpretation, there can be no reasonable doubt but that these provisions of the statute require a foreign corporation to secure a permit to solicit a sale of its stock in this state, or to engage in preliminary negotiations looking towards such sale, even though the issuance of the securities and the transfer of their title will, in good faith, be completed in a foreign state. The sections quoted clearly prohibit a foreign corporation from soliciting in this state a sale of stock of its own issue without first securing a permit, even though in good faith the issuance of the stock and transfer of title are to take place in the foreign state. We also have no doubt that, although such a regulation may impose some restraint on interestate commerce and place some restriction on free speech, it is a valid exercise of the state's police power, and is not unconstitutional. It is true that in the Robbins case, *supra*, [*Robbins v. Pacific Eastern Corp.*, 8 Cal. 2d 241, 65 P.2d 42 (1937) cited in the Petition at page 12] these problems were expressly left open and not decided, and that no other California case seems to have expressly determined these questions, but the suggested construction is so clear that reasonable minds cannot differ thereon, and the question of constitutionality has been so long settled that citation of authority would be superfluous." (94 Cal. App. 2d at 329.)

Petitioners fail to mention *Hardy v. Musicraft Records, Inc.*, 93 Cal. App. 2d 698, 209 P.2d 839 (1949), essentially similar to the facts in the case at bar and relied upon by the Court of Appeals, where defendant sent a letter to plaintiff in Los Angeles enclosing a purchase commitment letter to be executed by plaintiff in connection with the purchase of stock. Plaintiff signed the purchase commitment letter and returned it. California Bank in Los Angeles acted as escrow agent. Plaintiff paid the Bank and the Bank delivered the stock. The court said:

> "*[I]t is clear that the shares were sold in California . . . There was no enforceable contract of sale until plaintiffs signed and placed in the United States mail the purchase commitment letter which had been drafted in New York and forwarded with the corporation's letter . . . The letter from the corporation . . . was an offer to sell and the signed and mailed acceptance constituted the only consummated or enforceable contract between the parties.*
>
> "Since the offer was received and accepted in California by plaintiffs and the certificates were delivered in this state . . . the contract was in all respects completed here. There is no pretense that the certificates were delivered in New York since there was no delivery until the purchase price of the stock had been paid." (93 Cal. App. 2d at 701-02) (Emphasis added).

Petitioners also fail to distinguish or even mention two criminal cases, *People v. Rankin*, 169 Cal. App. 2d 150, 337 P.2d 182 (1959), *cert. den.* 362 U.S. 905, and *People*

v. Mills, 162 Cal. App. 2d 840, 328 P.2d 1049 (1958), in which convictions for California Blue Sky Law violations were upheld (notwithstanding the greater burden of proof in criminal cases) despite the foreign issuers' objection to extraterritorial application of the Blue Sky Law. In *People v. Mills*, the court said:

> "[T]he evidence would not support an inference that the transaction, if and when completed, would have been a Nevada contract. *It was made* and to be performed in California. *The last act was not to be done in Nevada but in California when the stock was delivered to Meng and Shrader*." (162 Cal. App. 2d at 857.) (Emphasis added.)

Doherty v. Bartlett, 81 F.2d 920 (1st Cir. 1936), *reh. den.*, 83 F.2d 259, *cert. den.* 298 U.S. 676, cited by Petitioners, applied New Hampshire (not California) law in wholly different factual context. The California authorities cited herein, as applied to the facts of this case, amply support the judgment of the Court of Appeals.

C. The District Court's Finding, Affirmed by the Court of Appeals, That No Joint Venture Existed, Was Supported by Substantial Evidence.

First, the joint venture issue is an issue of fact on which the District Court's decision is amply supported by the evidence. Findings as to the existence or nonexistence of a joint venture are judged by the "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure. See, *e.g.*, *Anderson v. Property Developers, Inc.*, 555 F.2d 648 (8th Cir. 1977); *Moran v. H. W. S. Lbr. Co,*, 538 F.2d 238 (9th Cir. 1976); *Lewis v. Butz*, 512 F.2d 681 (8th Cir. 1975); *McArthur v. Rumbaugh*, 310 F.2d 376 (2d Cir. 1962); and *In Re Segal*, 157 F.Supp. 232 (S.D. Calif. 1957).

Second, the agreements on which Petitioners rely have no markings of a joint venture. At best, the agreements are ambiguous. At worst, the language of the agreements destroys their position.

Paragraph 21 of the Operating Agreement between the parties states in part:

> *"It is not the intention of the parties to create, nor shall this agreement be construed as creating a mining or other partnership or association, or to render them liable as partners."* (Emphasis added.) (Exhibit B to PX 26 and 36.)

A joint venture is simply a partnership limited to one or several transactions. *In Re Gotfried*, 45 F.Supp. 939 (S.D. Calif. 1942), *reversed on other grounds, Western Fruit Growers, Inc. v. Gotfried*, 136 F.2d 98 (9th Cir. 1943). The relationship between joint venturers is identical to that of partners. *Bank of California v. Connolly*, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468 (1973); *Brooks v. Muth*, 144 Cal. App. 2d 560, 301 P.2d 404 (1956); *Grant v. Weatherholt*, 123 Cal. App. 2d 34, 266 P.2d 185 (1954). Partnership law, including the concept of *joint* and several liability, is applicable to joint ventures. *Ohio Cas. Ins. Co. v. Harbor Ins. Co.*, 259 Cal. App. 2d 207, 214, 66 Cal. Rptr. 340 (1968). Each "joint venturer" is fully liable for all the joint venture debts. See *e.g.*, *Orlopp v. Wiltardson Co., Inc.*, 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125 (1965) and *Cahill Bros., Inc. v. Clementina Co.*, 208 Cal. App. 2d 367, 387, 25 Cal. Rptr. 301 (1962).

But for the names of the parties, this case is identical to *Cross v. Pasley*, 270 F.2d 88 (8th Cir. 1959), *cert. den.*, 362 U.S. 902.

> "Here, of vital importance is the letter of confirmation and the operating agreement which expressly

negate the theory of joint adventure, or partnership. The former stated that 'nothing herein contained shall be deemed to create any relation of mining or other partnership as between us, . . .' 'and the latter provided that '. . . this agreement shall never be construed as creating, a joint venture, mining partnership or other relationship whereby any party shall be liable for the acts either o[f] omission or commission, of any other party or parties hereto.' " (270 F.2d at 92.)

A joint venture would render the parties liable as partners —exactly the result which paragraph 21 of the Operating Agreement sought to avoid.

Third, the requisite control necessary for a joint venture did not exist. Cutting through Petitioners' rhetoric (executive decisions vs. line decisions), Respondent's only right of control which Petitioners can point to was his right to opt out at the completion stage.

As the Court of Appeals recognized in its 1975 opinion, the investors in these programs had minimal control (524 F.2d at 116). On remand, the District Court agreed and found that such control was "sufficient neither in name nor in exercise for the finding of a joint venture" (CR 450).

Petitioners obligated themselves to drill wells on the assigned leases and agreed to furnish each investor with certain information concerning the test wells and with access to the drilling site (PX 26 and 36, paragraph 3, pages 1 and 2). The agreements do not entitle the investor to anything other than the notices described above and the investor was not obligated by the agreements to do anything but pay money (Jack Davis deposition, p. 14).

The only right of control which Petitioners can point to in the record was Respondent's option to get out of the deal rather than proceed past the casing point. This decision was

minimal. Of the 9 wells attempted, only 2 reached this point.

The applicable test is whether "the purchaser is a mere investor who contemplates the receipt of profits from activities of other persons connected with the enterprise," in which case the interest is an "investment contract," or whether realistically "the buyer is to share in the conduct and control of the enterprise," in which case the arrangement is a joint venture. *People v. Sidwell,* 27 Cal. 2d 121, 162 P.2d 913 (1945); *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, 134 P.2d 777 (1943); *People v. Witzerman,* 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972); *Rivlin v. Levine,* 195 Cal. App. 2d 13, 15 Cal. Rptr. 587 (1961); *People v. Rankin, supra,* 169 Cal. App. 2d 150, 337 P.2d 182; *Goldberg v. Paramount Oil Co.*, 143 Cal. App. 2d 215, 300 P.2d 329 (1956); *M.G.N. Oil Co., Inc. v. Guiberson,* 126 Cal. App. 2d 87, 271 P.2d 525 (1954); *McFaul v. Deck,* 30 Cal. App. 2d 424, 86 P.2d 890 (1939); *People v. Jackson,* 24 Cal. App. 2d 182, 74 P.2d 1085 (1937), *questioned on other grounds,* 42 Cal. 2d 246, 267 P.2d 271. In *Goldberg v. Paramount Oil Co., supra,* 143 Cal. App. 2d 215, the court ruled:

> "None of this evidence shows any participation by plaintiff in the conduct of the enterprise. Plaintiff was a mere investor. The contract without ambiguity contemplated he was to play the passive role of investor only. *He did not expect to reap a profit from his own services or other active participation in the enterprise* . . ." (143 Cal. App. 2d at 222.) (Emphasis added.)

Similarly, in *People v. Jackson, supra,* 24 Cal. App. 2d 182, the court found that the right of ingress and egress for the purpose of drilling given to San Diego residents for well sites located in Oklahoma was illusory because it was never intended that such right would be used.

The judgments of the District Court and Court of Appeals on the joint venture issue are well supported by the facts and applicable law. Petitioners' fear that the joint venture finding will disrupt national energy policy and make standard oil and gas participation agreements subject to attack is absurd. Securities laws are not difficult to comply with. Most oil and gas syndications are qualified with State Blue Sky officials and with the Securities and Exchange Commission. All that Petitioners must do in the future is comply with the securities laws when they sell securities.

Conclusion.

The Court of Appeals properly ascertained California law, finding guidance in numerous California authorities. The decision below is well supported by the state case law applicable in a diversity case and by the facts proved. Neither the process nor the result of the decision of the Court of Appeals warrants review by this Court; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.